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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB S. MCKENZIE,

Defendant and Appellant.

D051744

(Super. Ct. No. SCD202379)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Danielson, Larrie R. Brainard and Albert T. Harutunian, III, Judges. Reversed.

Following a denial of his motion to suppress evidence at the preliminary hearing (Pen. Code,<sup>1</sup> § 1538.5), and a denial of his renewed motion to suppress (§ 1538.5, subd.(i)), Jacob McKenzie pleaded guilty to possessing marijuana for sale (Health & Saf. Code, § 11359) and possessing a firearm while under a restraining order (§ 12021, subd.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

(g)(2)). McKenzie appeals, contending the court erred in denying his motion to suppress because officers conducted a warrantless, nonconsensual entry into his house without a showing of exigent circumstances, thereby requiring the exclusion of all evidence. We conclude there was insufficient evidence to support the court's factual finding of exigent circumstances to justify the warrantless, nonconsensual entry of McKenzie's home. We therefore reverse the judgment.

## FACTS

On October 19, 2006, San Diego Police Officers Richard Bulette and Aaron Fradente were on foot patrol in South Mission Beach, looking for a suspect in connection with two residential robberies, one including a violent sexual assault, when they received several calls about a suspicious black male wearing a grey jersey, in his 20's or 30's, going door to door to sell candy. The reports indicated the man was asking residents if they had ever been raped by a door-to-door salesman.

A short time later, Bulette saw Andrew Maltoral, a Hispanic man, wearing a white jersey and a dark-colored baseball hat. Believing he matched the suspect's description, Bulette approached Maltoral who began walking quickly into the front yard of a nearby house. Bulette saw McKenzie, a white man, open the front door of his house and Maltoral walk straight in.

Believing another home invasion robbery was in progress, Bulette called for back-up and approached the front door. As Fradente joined Bulette, Bulette began knocking on the door, but there was no response. As Bulette knocked for the third time, McKenzie

opened the front blinds of a window adjacent to the door. After Bulette identified himself, McKenzie opened the outer door, remaining behind the closed screen door.

Bulette asked McKenzie where the black man was who had just entered the house. McKenzie responded, "What black male?" Bulette then repeated his question, to which McKenzie answered, "Oh, do you mean Andres?" Maltoral came to the door and walked outside with Bulette.

Maltoral told Bulette he was at the house to watch a baseball game with his friend. When asked who lived in the house, Maltoral responded "Jacob." Maltoral did not have any identification on him at the time.

As Bulette questioned Maltoral in the front yard, Fradente had a brief conversation with McKenzie at the front door. Although McKenzie appeared nervous, he did say he lived there. Fradente asked McKenzie for identification, which McKenzie agreed to retrieve.

As McKenzie went to get his identification, Sergeant Patrick Dinson arrived on the scene. Initially, Dinson coordinated the placement of officers around the perimeter of the house. Officer Sylvester, who was inside the property line of McKenzie's home, told Dinson he saw a mason jar with marijuana through the front window. According to Dinson, he only briefly peeked through the window, but did not confirm Sylvester's observations. He did, however, see a "couple people" sitting inside the house.

As Dinson worked his way back toward the front of the house, he checked with Bulette to determine the status of the situation. Bulette told Dinson he was already speaking to the one individual he thought may be the possible home invasion robbery

suspect. Dinson then joined Fradente at the front door. Fradente told Dinson that Bullette was talking to the suspect outside and that another person had gone to retrieve his identification. Dinson told Fradente to "grab" that person when he returned to the door because Dinson could see marijuana in plain sight. However, according to Dinson, he asked Fradente to "grab" McKenzie in order to secure the people inside the house and to make sure everyone was safe from a potential home invasion robbery.

When McKenzie returned to the door with his identification, Fradente grabbed him from the inside threshold of the house and placed him in handcuffs. Shortly after, Officers Cooke and Woodrow arrived at the scene, remaining with Maltoral in the front yard while Bullette approached the front door. Dinson informed Bullette there was marijuana in plain sight inside the residence and that he wanted to do a security check to make sure there was no one else inside the house who was possibly hurt or injured. Sylvester informed Bullette there were two other individuals inside the house and that a mason jar with marijuana was on the coffee table. Before the officers entered, the two individuals inside the house were asked to walk out. After they walked out, they were detained in the front yard. Dinson and a number of other officers then performed a security sweep inside the house and checked each room. The officers saw a clothes basket with clear plastic bags of marijuana and a gun case in the bedroom closet. After clearing the room, Bullette called Robert Lange, the last witness of the reported suspicious activity in the neighborhood. Lange came to the scene and confirmed that Maltoral was not the suspect he reported to police.

Four hours after the initial entry, Detective Michael Mendez arrived on the scene and a search warrant was obtained. The officers found a mason jar of marijuana, a laundry basket containing several bags of marijuana, a duffel bag with approximately 10 bags of marijuana, two magazines of ammunition, a .40 caliber gun and a gun case. More marijuana and two weight scales were found in another room.

At no time did McKenzie give consent to enter his house. A total of 9.4 pounds of marijuana was recovered.

## DISCUSSION

McKenzie first moved to suppress the evidence obtained against him at the preliminary hearing. After considering the issue and hearing argument, the magistrate denied the motion saying:

"It seems to me that these officers were in a situation when some serious, serious crimes have occurred in that neighborhood. They were out looking to try to find perpetrators of those crimes. They got numerous calls, apparently by someone going door to door saying have you ever been raped by a door-to-door salesman. Description was, it was a black male. They get information that the person is in a sports jersey. It's the kind of thing where a person has a shirt on that has numbers and some sort on it, like on a sports jersey. Whether it's gray or white, it's not sure is something people would be sure about. And they talked to Mr. Lange who said that this person was wearing those clothes with a baseball hat. They see a person matching that description who is clearly, quote, black, although light-skinned, which I assume means from his name there is a Hispanic connection. Maybe half and half. That kind of thing. As much of other society is. He sees a person matching the description who seems to flee from the scene into a house. The officer takes that as a forced entry. It seems clear it was not, but as a forced entry and acting accordingly. Once they see, and after they smell the marijuana in connection with these persons, they had every right to detain the persons. And the only issue left would be should they have been able to sweep the residence in terms of these

detentions. And I think generally the answer is yes. They have the right to make sure there is no one hiding, injured, any other such thing. Once that information of seeing the marijuana, smelling it, seeing the weapon, was put into a warrant to a judge, the judge certainly has complete -- issue the warrant. It took some hours. That's regrettable, but I don't think that that negates the legality of the situation. [¶] The motion to suppress is denied."

After being bound over, McKenzie renewed his suppression motion. The trial court denied the motion saying:

"I looked through the assertions raised by the defense and I find that the Magistrate was within its discretion in making the findings that he did base[d] on the evidence before him. The fact that there are different implications that one could draw from the evidence does not mean that the defense had a right to the magistrate making those determinations. I think that the Magistrate's findings about basically exigent circumstances, the basis for doing a protective sweep and the concerns of law enforcement about the suspicious circumstances of entry into the residence and the suspicious responses they got when they sought to investigate further all permitted the Magistrate to reach the conclusions that he did. Therefore, the motion is denied."

McKenzie contends the magistrate erred in denying his motion to suppress because the police officers did not have exigent circumstances to justify a warrantless, nonconsensual entry into his home. We conclude there was not substantial evidence to support the magistrate's finding of exigent circumstances.

#### A. Standard of Review

Where a motion to suppress is submitted to the superior court on the preliminary hearing transcript, we disregard the findings of the superior court and review the determination of the magistrate, drawing all presumptions in favor of the factual determinations of the magistrate, upholding the magistrate's express or implied findings if they are supported by substantial evidence. (*People v. Hua* (2008) 158 Cal.App.4th

1027, 1033.) Substantial evidence is evidence which is "reasonable, credible," of "solid value," and which "reasonably inspires confidence," and measuring these facts against the federal constitutional standard of reasonableness. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1119; *People v. Marshall* (1997) 15 Cal.4th 1, 34.)

#### B. Implied Finding of the Magistrate

Here, the officers entered McKenzie's home without his consent and without a warrant. The magistrate denied McKenzie's suppression motion, justifying the officers' entry upon a showing of exigent circumstances. Specifically, the magistrate found that once officers smelled marijuana and believed there could be people hiding or injured inside the residence, the officers were justified in entering the home. The Attorney General agrees, contending the "protective sweep" of McKenzie's house was "infinitely justified under the exigent circumstances and/or emergency aid exceptions to the warrant requirement."

We conclude that the magistrate was not presented with substantial evidence to justify a warrantless entry into McKenzie's home based on either exigent circumstances, a protective sweep justification, or the community caretaking doctrine.

#### C. Warrantless Entry of McKenzie's Home

The Fourth Amendment protects "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches . . . ." (U.S. Const., 4th Amend.) This guarantee has been incorporated into the Fourteenth Amendment, and is applicable to the states. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655.) A similar guarantee against unreasonable government searches is set forth in the state Constitution (Cal. Const., art. I,

§ 13) but, since voter approval of Proposition 8 in June 1982, state and federal claims relating to exclusion of evidence on grounds of unreasonable searches are measured by the same standard. (*In re Lance W.* (1985) 37 Cal.3d 873, 886-887.)

At the "risk of belaboring the obvious," private homes are "places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." (*United States v. Karo* (1984) 468 U.S. 705, 714; *People v. Camacho* (2000) 23 Cal.4th. 824, 831 (*Camacho*).) Indeed, the " 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' [Citations.]" (*Ibid.*) A principle cornerstone of the Fourth Amendment is that a person may " 'retreat into his own home and there be free from unreasonable governmental intrusion.' [Citations.]" (*Ibid.*) A warrantless search of a home is *per se* unreasonable unless there is a showing of "probable cause plus" one of several "specifically established and well-delineated" exceptions. (*Kirk v. Louisiana* (2002) 536 U.S. 635, 638; *Vale v. Louisiana* (1970) 399 U.S. 30, 34.)

#### D. Exigent Circumstances Exception

The "exigent circumstances" exception to the warrant requirement allows an officer to enter a home without a warrant if, based on a totality of the circumstances, that officer believes swift action is needed to " 'prevent imminent danger to life or serious damage to property,' " or to " 'forestall the imminent escape of a suspect or destruction of evidence.' [Citation.]" (*People v. Duncan* (1986) 42 Cal.3d 91, 97, 104.) Entry into a home based on exigent circumstances requires probable cause to believe the entry is



justified by one of these urgent needs. (*People v. Celis* (2004) 33 Cal.4th 667, 676.) The action must be " 'prompted by the motive of preserving life or property and [must] reasonably appear[ ] to the actor to be necessary for that purpose.' [Citation.]" (*Duncan, supra*, 42 Cal.3d at p. 97.) "There is no ready litmus test for determining whether such circumstances exist"; rather each case must be measured "by the facts known to the officers." (*People v. Ramey* (1976) 16 Cal.3d 263, 276.) Thus, in determining whether the officer acted reasonably, " 'due weight must be given not to his unparticularized suspicions or hunches, but to the reasonable inferences which he is entitled to draw from the facts in light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary.' [Citation.]" (*Duncan, supra*, 42 Cal.3d at p. 98.)

Here, the evidence did not support the magistrate's finding of exigent circumstances. Although officers may have initially perceived a possible home invasion robbery in progress, the only suspect, Maltoral, was being questioned and detained outside the home. Thus, any initial fear the officers had was ultimately mitigated. Additionally, McKenzie told police he lived in the house, resolving any fear that he was a potential suspect in the home invasion robbery. In short, neither McKenzie nor Maltoral objectively posed a plausible threat to officers or occupants of the house as a potential suspect in a home invasion robbery.

Several other factors support a conclusion that there was insufficient evidence to justify the Magistrate's finding of exigent circumstances. Both Maltoral and McKenzie identified one another by their respective first names to the officers. It is difficult to

conceive of a home invasion robbery in which such familiarity exists between perpetrator and victim. Further, it is not clear that Maltoral initially matched the description of the home invasion robbery suspect. For example, he was wearing different clothing than that reported and was of a different race. Moreover, Lange, the original witness of suspicious activity in the neighborhood, confirmed that Maltoral did not match the description of the suspect.

Dinson, as the instigating officer in conducting the warrantless entry of McKenzie's house, did not have specific and articulable facts that would allow him to draw reasonable inferences that his actions were necessary. Upon arriving on the scene, Dinson was told that the only suspect in the home invasion robbery was being questioned in the front yard of the house. He was also told that McKenzie, the resident of the house, was retrieving his identification for Fradente. Despite this mitigating percipient knowledge, however, Dinson ordered the detention of McKenzie and that a protective sweep was to be conducted because Dinson's "mind set was that [there was] a robbery in progress . . . and [he] needed to make sure everybody inside [the house] was safe." The record fails to support this claimed justification for the warrantless entry.

Dinson's justifications for entering McKenzie's home, based on both his testimony and the implied findings of the magistrate, appear to be predicated on observing and smelling marijuana in McKenzie's home. Both Bulette and Fradente said Dinson told them he observed marijuana inside the home and wanted to conduct a sweep of the house. Moreover, the Magistrate found that once officers "[saw], and . . . smell[ed] the marijuana in connection with these persons, they had every right to detain the persons."

A warrantless police search of a dwelling where the search's only justification is probable cause to believe that contraband is there, however, is a violation of the Fourth Amendment. (*Agnello v. United States* (1925) 269 U.S. 20, 33.) Thus, any justification for entering McKenzie's home based solely on the presence of marijuana does not support a legal basis for entering McKenzie's home without a warrant.

We conclude there was not substantial evidence to support the magistrate's finding of exigent circumstances to justify the officers' warrantless entry of McKenzie's home.

#### E. Protective Sweep Exception

The officer's entry into McKenzie's house was also not justified as a protective sweep. The Fourth Amendment permits a security sweep as an exception to the warrant requirement where that "properly limited protective sweep [is] in conjunction with an in-home arrest [and where] the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Maryland v. Buie* (1990) 494 U.S. 325, 337 (*Buie*)). A " 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." (*Id.* at p. 327.) As a matter of policy, the purpose of the protective sweep exception is to provide an "adjunct to the serious step of taking a person into custody for the purpose of prosecuting him [or her] for a crime," and to allow officers to take "steps to assure themselves that the house in which a suspect is being, or has just been, arrested

is not harboring other persons who are dangerous and who could unexpectedly launch an attack." (*Id.* at p. 333.)

Unlike an entry based on exigent circumstances, "[a] protective sweep of a house for officer safety as described in *Buie*[, *supra*, 494 U.S. 325], does not require probable cause to believe there is someone posing a danger to the officers in the area to be swept." (*Celis, supra*, 33 Cal.4th at p. 678.) A "protective sweep can be justified merely by a *reasonable suspicion* that the area to be swept harbors a dangerous person." (*Ibid.*)

Appellate courts have "differed regarding the requirements for a protective sweep." (*Celis, supra*, 33 Cal.4th at 678.) Some have concluded that a "protective sweep must be 'incident to' a lawful arrest inside a house." (*Ibid.*) Others have "upheld protective sweeps when the officers were lawfully inside a house for some purpose other than to arrest a suspect. . . . Still others have allowed a protective sweep of a house when the officers were not inside the house at all, but had arrested a suspect just outside; in these cases the officers then entered the house to conduct the sweep." (*Ibid.*) This split among courts has led the California Supreme Court to ask whether such a rationale would "also apply when officers enter a home to conduct a protective sweep after lawfully detaining a suspect outside the residence[.]" (*Id.* at p. 679.) This is an issue we need not resolve because the facts known to the officers in this case, when they entered McKenzie's house, ultimately "fell short of the reasonable suspicion standard necessary to justify a protective sweep under *Buie, supra*, 494 U.S. 325." (*Ibid.*)

Here, officers did not arrest McKenzie inside his house, nor did they formally place McKenzie under arrest. Instead, officers "grabbed" McKenzie from inside the

threshold of his house, placed him in handcuffs, and proceeded to conduct a protective sweep of his home. As we previously discussed, the facts available to the officers, particularly Dinson, would not lead to a reasonable suspicion that a dangerous person was harbored in the house, posing a threat to the officers on the scene.

Dinson testified he saw two additional individuals sitting inside the house. These two individuals did not appear to be in distress, nor did they match the description of any potential suspect. Moreover, the only possible suspect was detained outside the home. The two individuals on the couch came out of the house at the officers' request. After everyone was removed from the house, the officers conducted a sweep of the house, not looking for dangerous individuals, but rather searching for the previously observed marijuana. Thus, the warrantless entry of McKenzie's home may not be justified on the grounds of a protective sweep.

#### F. Community Caretaking/Emergency Aid Exception

The officers' warrantless entry into McKenzie's home was also not justified under the community caretaking/emergency aid exception. The community caretaking/emergency aid doctrine "is not a subcategory of the exigent circumstances exception to the warrant requirement. Rather, it is a subcategory of the community caretaking exception, a distinctly different principle of Fourth Amendment jurisprudence." (*People v. Ray* (1999) 21 Cal.4th 464, 471.) The "community caretaker exception is only invoked when the police are not engaged in crime-solving activities." (*Ibid.*) Thus, "[u]pon entering a dwelling, officers view the occupant as a potential victim, not as a potential suspect." (*Ibid.*)

Under the emergency aid exception, police officers " 'may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance.' [Citation.]" (*Ray, supra*, 21 Cal.4th at p. 470.) " ' "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." [Citation.]' " (*Ibid.*) Thus, "the police may seize any evidence that is in plain view during the course of their legitimate emergency activities." (*Ibid.*)

Community caretaking activities are varied and are " 'performed for different reasons.' " (*Ray, supra*, 21 Cal.4th at p. 472.) Thus, "[e]ach variant must be assessed according to its own rationale on a case-by-case basis" because " 'what is reasonable depends on the context within which a search takes place.' [Citation.]" (*Ibid.*) The community caretaking exception requires "specific, articulable facts indicating the need for " 'swift action to prevent imminent danger to life or serious damage to property." [Citation.]' [Citation.]" (*Ray, supra*, 21 Cal.4th at pp. 472-473.) We do not find such facts in this record.

Although the officers may have been concerned for the safety of residents inside the home, that concern was no longer valid once officers had the only suspect, Maltoral, outside the house. Additionally, no other occupant of the house seemed to be in distress. McKenzie indicated to Fradente that he lived in the house. The two additional individuals inside the house did not seem to be in danger as they were seen by Dinson to be sitting on the couch. No reasonable person in the position of the officers would believe entry was immediately necessary to aid life or limb.

This does not stop our inquiry, however. Under the community caretaking exception, "circumstances short of a perceived emergency may justify a warrantless entry, including the protection of property, as 'where the police reasonably believe that the premises have recently been or are being burglarized.' [Citation.]" (*Ray, supra*, 21 Cal.4th at p. 473.) Thus, "[o]f necessity, officers may enter premises to resolve the situation and take further action if they discover a burglary has occurred or their assistance is otherwise required." (*Ibid.*)

Here, again, there is no evidence to support a reasonable belief that property was being damaged. The only suspect was being questioned outside and there was no information available to Dinson at the time to justify his belief that property or persons were in need of protection inside the house. Accordingly, we conclude the officers' warrantless entry of McKenzie's house was not justified under the community caretaking/emergency aid exception.

#### DISPOSITION

The judgment is reversed.

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HUFFMAN, J.

WE CONCUR:

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BENKE, Acting P. J.

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McDONALD, J.